2/22/07

(24)

No. 06-480

IN THE
Supreme Court of the United States

LEEGIN CREATIVE LEATHER PRODUCTS, INC.,

Petitioner,

v.

PSKS, INC., doing business as Kay's Kloset . . . Kay's Shoes,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED OCTOBER 4, 2006
CERTIORARI GRANTED DECEMBER 7, 2006

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RELEVANT DOCKET ENTRIES IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

COURT OF APPEALS DOCKET #: 04-41243
PSKS Inc, et al v. Leegin Creative

* * *

9/25/04 Private civil diversity case docketed. NOA filed by Appellant Leegin Creative. [04-41243] (pac)

* * *

12/28/04 Appellant's Brief filed by Appellant Leegin Creative. Copies of Brief: 7 # of pages: 58 Word count: 13,694 Date of COS: 12/24/04 Hand Delivered [Y/N]: n Disk Provided [Y/N]: y Sufficient [Y/N]: n NEEDS APPEARANCE FORM FOR ATY BAKER. [5043066-1] [04-41243] A/Pet's Brief ddl satisfied. E/Res's Brief due 01/27/05 for Toni Cochran LLC, for PSKS Inc. Sufficient Brief due on 1/18/05 for Leegin Creative. (ddv)

* * *

2/25/05 Appellee's Brief filed by Appellee PSKS Inc, Appellee Toni Cochran LLC. Copies of Brief: 7 # of pages: 45 Word count: 10,902 Date of COS: 2/24/05 Hand Delivered [Y/N]: n Disk Provided [Y/N]: y Sufficient [Y/N]: y. [508442-1] [04-41243] E/Res's Brief ddl satisfied. Reply Brief due on 3/11/05 for Leegin Creative. (jca)

* * *

3/15/05	Reply brief filed by Appellant Leegin Creative. Copies of Brief: 7 # of pages: 30 Word count: 6,834 Date of COS 3/14/05 Disk Provided [Y/N]: y Sufficient [Y/N]: y. [5107009-1] [04-41243] Reply Brief ddl satisfied. (jca)
	* * *
12/7/05	Oral argument heard. Case argued by Tyler Alexander Baker for Appellant Leegin Creative, Jeffrey Scott Levinger for Appellant Leegin Creative, Robert W Coykendall for Appellee Toni Cochran LLC, Appellee PSKS Inc [04-41243] (sme)
	* * *
3/20/06	Opinion filed. Mandate pull date is 4/10/06. [04-41243] (rmf)
3/20/06	Judgment entered and filed. [04-41243] (rmf)
	* * *
4/3/06	Petition filed by Appellant Leegin Creative for rehearing. # of copies filed: 4 [5412300-1] Mandate pull date canceled. Date of COS: 4/3/06 Sufficient [Y/N]: Y [04-41243] (rjd)
4/3/06	Petition filed by Appellant Leegin Creative for rehearing en banc. # of copies filed: 20 [5412303-1] Date of COS: 4/3/06 Sufficient [Y/N]: Y [04-41243] (rjd)
	* * *
4/27/06	Response/opposition filed by Appellee PSKS Inc, Appellee Toni Cochran LLC to petition for rehearing [5412300-1] by Appellant Leegin Creative, petition for rehearing en banc [5412303-1] by Appellant Leegin Creative Response/Opposition ddl satisfied. Date of COS: 4/26/06 Sufficient [Y/N]: Y [5434432-1] [04-41243] (cpd)

7/19/06 COURT Order filed denying petition for rehearing [5412300-1], denying petition for rehearing en banc [5412303-1] With poll (Y/N)?: N Mandate pull date is 7/26/06. Copies to all counsel. [04-41243] (cpd)

7/25/06 Motion filed by Appellant Leegin Creative to stay the mandate [5509712-1] Response/Opposition due on 8/7/06. Date of COS: 7/24/06 Sufficient [Y/N]: y [04-41243] (sat)

* * *

7/31/06 Response/opposition filed by Appellee PSKS Inc to motion to stay mandate [5509712-1] by Appellant Leegin Creative Response/Opposition ddl satisfied. Date of COS: 7/28/06 Sufficient [Y/N]: y [5513423-1] [04-41243] (sat)

8/7/06 Reply filed by Appellant Leegin Creative to response/opposition [5513423-1], motion to stay mandate [5509712-1] Sufficient [Y/N]: Y [5518814-1] [04-41243] (cpd)

8/11/06 COURT Order filed denying motion to stay mandate [5509712-1] (RHB) Copies to all counsel. [04-41243] (sat)

8/15/06 Mandate issued. Approved BOC Issued (Y/N)?: n [04-41243] Mandate pull date satisfied. (sat)

* * *

8/22/06 Filing Sup Ct order entered 8/22/06 recalling this Court's mandate and staying this case pending receipt of a response and further order of the undersigned or of the Court. This order is conditioned upon the posting of a good and sufficient bond with the Clerk of the USCA, the adequacy of such bond to be determined by that Court. [04-41243] (ams)

8/23/06 COURT Order filed. This court's 15 August 2006 mandate was recalled and stayed on 22 August by the Supreme Court pending other proceedings. The order was "conditioned upon the posting of a good and sufficient bond with [our court], the adequacy of such bond to be determined by [our] Court". It is this court's understanding, however, that: an unopposed motion for a bond in the amount of $4.25 million was filed in the United States District Court for the Eastern District of Texas; and any bond should be posted there. Therefore, this matter is remanded to that court for the bond to be posted there, consistent with the condition imposed by Supreme Court's 22 August order. [5532619-1] Awaiting DC Action on 9/7/06. (RHB, EBC, KDE) Copies to all counsel. [04-41243] (ams)

8/28/06 SUPREME COURT Order filed. The application to recall and stay the mandate of the USCA for the 5th Circuit, presented to Justice Scalia and by him referred to the Court is granted pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the issuance of the judgment of this Court. This order is conditioned upon the remaining in effect of the bond posted in the USDC for the Eastern District of Texas. [04-41243] (ams)

* * *

RELEVANT DOCKET ENTRIES IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

CIVIL DOCKET FOR CASE #: 2:-03-cv-00107-TJW

* * *

Date Filed	#	Docket Text
04/25/2003	1	Original Complaint filed. Cause: 28:1337 Sherman-Clayton Act (poa) (Entered: 04/28/2003)
* * *		
06/05/2003	4	Answer & Counterclaims to complaint by Leegin Creative (ktd) (Entered: 06/12/2003)
06/05/2003	4	Counterclaim by Leegin Creative against PSKS Inc (ktd) (TWO-PLEADING DOCUMENT. SEE #4 Answer & Counterclaims to complaint) Modified on 11/15/2006 (ehs,) (Entered: 06/12/2003)
* * *		
07/03/2003	12	REPLY to counterclaim by PSKS Inc (poa) (Entered: 07/07/2003)
07/09/2003	13	Reply (Answer) to counterclaim by PSKS Inc (ktd) (Entered: 07/09/2003)
* * *		

09/17/2003	23	First Amended complaint by PSKS Inc, Toni Cochran LLC, (Answer due 9/29/03 for Leegin Creative) amending [1-1] complaint (exhibits not scanned) (ktd) (Entered: 09/17/2003)
* * *		
10/13/2003	26	Filed in Tyler Answer & Counterclaims to first amended complaint by Leegin Creative (ktd) Modified on 10/15/2003 (Entered: 10/15/2003)
10/13/2003	26	Filed in Tyler Amended counterclaim by Leegin Creative against Leegin Creative: amending [4-1] counter claim (ktd) (TWO-PLEADING DOCUMENT. SEE #26 Answer & counterclaims to first amended complaint by Leegin Creative) Modified on 11/15/2006 (ehs,). (Entered: 10/15/2003)
* * *		
11/04/2003	28	Answer to counterclaim of dft by PSKS Inc (ktd) (Entered: 11/04/2003)
* * *		
03/05/2004	42	MOTION to Limit the Testimony of Kenneth G Elzinga by PSKS Inc, Toni Cochran LLC. (exhibits not attached) (poa,) (Entered: 03/08/2004)
* * *		

03/18/2004	58	RESPONSE to Motion re 42 MOTION to Limit the Testimony of Kenneth G Elzinga filed by Leegin Creative Leather Products Inc. (ktd,) (Entered: 03/22/2004)
	* * *	
03/26/2004	62	MEMORANDUM OPINION & ORDER granting 42 Motion to limit the testimony of Kenneth G Elzinga for the reasons expressed in this order, and to the extent set forth herein. Signed by Judge T. John Ward on 3/25/04. (ktd,) (Entered: 03/26/2004)
03/26/2004	63	FILED UNDER SEAL Renewed MOTION for Summary Judgment by PSKS Inc, Toni Cochran LLC. (ktd,) Additional attachment(s) added on 11/15/2006 (ehs,). (Entered: 03/26/2004)
	* * *	
04/01/2004	67	RESPONSE to Motion re [63] Renewed MOTION for Summary Judgment, filed by Leegin Creative Leather Products Inc. (kjr,) (Entered: 04/02/2004)
	* * *	

04/02/2004	73	ORDER re [63] MOTION for Summary Judgment filed by PSKS Inc, Toni Cochran LLC. The ct will carry this motion with the case to trial. Signed by Judge T. John Ward on 4/2/04. (ktd,) (Entered: 04/02/2004)
* * *		
04/12/2004	83	MOTION for Judgment as a Matter of Law by Leegin Creative Leather Products Inc. (poa,) (Entered: 04/12/2004)
* * *		
04/12/2004	88	Proposed Jury Instructions by Leegin Creative Leather Products Inc.; Request Nos. 1-7; requested by defendant and refused by the Court. (shd,) (Entered: 04/13/2004)
* * *		
04/13/2004	98	JURY VERDICT for the plaintiff. (shd,) (Entered: 04/13/2004)
* * *		
05/24/2004	107	JUDGMENT in favor of dft against pla. Judgment for $3,975,000.00 inclusive of costs and fees is entered for the pla against dft. Signed by Judge T. John Ward on 5/19/04. (ktd,) (Entered: 05/24/2004)
06/08/2004	108	Filed in Tyler MOTION for New Trial by Leegin Creative Leather Products Inc. (ktd,) (Entered: 06/10/2004)

06/08/2004	109	Filed in Tyler RENEWED MOTION for Judgment as a Matter of Law by Leegin Creative Leather Products Inc. (ktd,) (Entered: 06/10/2004)
06/23/2004	110	RESPONSE to Motion re 108 MOTION for New Trial filed by PSKS Inc. (ktd,) (Entered: 06/23/2004)
06/23/2004	111	RESPONSE to Motion re 109 MOTION for Judgment as a Matter of Law filed by PSKS Inc. (ktd,) (Entered: 06/23/2004)
* * *		
06/30/2004	116	REPLY to Response to Motion in support re 108 MOTION for New Trial filed by Leegin Creative Leather Products Inc. (mpv,) (Entered: 07/08/2004)
06/30/2004	117	REPLY to Response to Motion in support re 109 RENEWED MOTION for Judgment as a Matter of Law filed by Leegin Creative Leather Products Inc. (mpv,) (Entered: 07/08/2004)
* * *		
08/17/2004	119	ORDER denying 108 Motion for New Trial, denying 109 Motion for Judgment as a Matter of Law. Signed by Judge T. John Ward on 8/17/04. (mpv,) (Entered: 08/17/2004)

09/08/2004	120	MOTION for Bond (*Unopposed, Supersedeas*) by Leegin Creative Leather Products Inc. (Attachments: #1 Exhibit Supersedeas bond #2 Text of Proposed Order) (Carroll, Otis) (Entered: 09/08/2004)
09/15/2004	121	NOTICE OF APPEAL as to 119 Order on Motion for New Trial, Order on Motion for Judgment as a Matter of Law, 107 Judgment by Leegin Creative Leather Products Inc. Filing fee $ 255, receipt number 103331. (copies to USCA & attorneys; Transcript order form mld to attorney) (ktd,) (Entered: 09/15/2004
* * *		

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

PSKS, Inc. d/b/a Kay's Kloset	§	
. . . Kay's Shoes;	§	
and Toni Cochran, L.L.C.,	§	
d/b/a/ Toni's	§	
Plaintiffs,	§	
v.	§	Civil Action No.
	§	02-03CV-107 TJW
Leegin Creative Leather	§	
Products, Inc.	§	
Defendant.	§	

First Amended Complaint

For their causes of action against defendant LEEGIN CREATIVE LEATHER PRODUCTS, INC., PSKS, INC. d/b/a KAY'S KLOSET . . . KAY'S SHOES, and Toni Cochran, L.L.C., d/b/a Toni's, Plaintiffs, states and alleges as follows:

I.
Parties

1. Plaintiff PSKS, Inc. d/b/a Kay's Kloset . . . Kay's Shoes ("Kay's Kloset") is a corporation duly organized and registered in accordance with Texas law.

2. Plaintiff Toni Cochran, L.L.C., d/b/a Toni's ("Toni's) is a Limited Liability Corporation, duly organized and registered in accordance with Texas Law.

3. Defendant Leegin Creative Leather Products, Inc. ("Leegin") is a California Corporation. Defendant may be served with process by serving its registered agent, Jerry Kohl at 14022 Nelson Ave., Industry, California 91746.

II.
Jurisdiction

4. This Court has jurisdiction in this case under 28 USC § 1331, 28 USC § 1337, and 28 U.S.C. § 1367. This Court also has jurisdiction in this case as it involves a federal question. More specifically the case involves the Sherman Anti-Trust and Clayton Acts.

5. The court has jurisdiction over the state law claims by virtue of supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

III.
Venue

6. Venue of this case is appropriate in the Eastern District of Texas under 15 U.S.C. §15(a). More specifically, Defendant is doing business in the Eastern District and has agents in the Eastern District. Additionally, venue of this case is appropriate in the Eastern District of Texas under 28 USC § 1391(b) and (c). Leegin has sufficient contracts with this district to subject it to personal jurisdiction. In fact, numerous retail stores, including ladies' boutiques, sell Brighton products supplied by Defendant Leegin. Further, the Brighton Ladies Division Manager for Defendant Leegin is Laura Young, who resides in Tyler, Texas. She has regional and/or national responsibility for Defendant Leegin, was a significant party to transactions involving Defendant Leegin and the Plaintiff Kay's Kloset, and on information and belief, at all natural times acted in the course and scope of her employment.

IV.
Facts of the Case

7. Plaintiff PSKS, Inc. does business as Kay's Kloset . . . Kay's Shoes in Lewisville, Texas. Kay's Kloset is a retail store for fashions, shoes and accessories. For a number of years, it has been a retail store for a line of handbags,

belts, jewelry and accessories manufactured by Defendant Leegin. It was instrumental in introducing Leegin's Brighton line of products to the market Kay's Kloset serves. Over the course of the years, these products have accounted for a substantial portion of plaintiff's business, and in the last 36 months accounted for approximately $1,500,000 or more in retail sales.

8. Plaintiff Toni Cochran, L.L.C., does business as Toni's in Livingston, Texas. Toni's opened in April, 2000, and began offering Brighton products. Between April, 2000, and February, 2002, Brighton products accounted for approximately $180,000 in retail sales at her store.

9. In the early 1990's Leegin began to manufacture the Brighton brand of products, which it markets as its signature product. Leegin distributes the Brighton line through thousands of independent retailers, as well as through stores directly owned or controlled by Leegin or its owner.

10. Defendant Leegin has, at material times, had a retail pricing and promotional policy to suppress price competition among retailers of Brighton products. Leegin applied suggested retail prices ("SRP") to the Brighton line through a so-called "Retail Pricing and Promotion Policy." A copy of this policy is attached hereto as exhibit "A." This policy solicits agreement from retailers not to discount Brighton products, permitting discounts only when agreed to in writing by Jerry Kohl, the owner of Leegin, or Laura Young, Ladies Division Sales Manager. Defendant Leegin has orchestrated and allowed certain retail discounts to certain of its favored customers, some of whom competed with Kay's Kloset in the Lewisville, Texas area. In the last twelve months when Kay's Kloset learned of the discounting, and was losing Leegin-related business because of the discounting, Plaintiff began to compete by discounting Brighton products.

11. Beginning in the late Fall of 2002, and continuing thereafter, Leegin, began to enforce the SRP policy against

Kay's Kloset, attempting to secure agreement from Plaintiff to comply with the policy, while at the same time receiving agreements from other retailers to adhere strictly to Leegin's pricing policy. In conversations trying to secure plaintiff's agreement to adhere to the policy, Brighton's sales representative was asked whether a competitor of the plaintiff had agreed to the policy. Plaintiff was assured that the competitor had agreed to the policy, and that the competitor no longer would be discounting Brighton products.

12. Plaintiff Kay's Kloset had, at certain times, offered to its customers 20% off Leegin-related products to directly compete within Plaintiff's market. Leegin demanded that signs promoting the sale be removed, and threatened sanctions of loss of the Leegin product line. As stated by Leegin's sales representative, Jan Clinkscale, told the owners of Kay's Kloset: "When people discount, it always comes back to haunt them. We don't want people to discount—we want people to sell Brighton at regular price." When Plaintiff refused to adhere to the SRP, Leegin stopped shipping products to Kay's Kloset. At the time that Plaintiff was informed of the action taken by Leegin, Plaintiff was told that the action was subject to review if Plaintiff would indicate agreement to adhere to the SRP in the future.

13. Plaintiff Toni's, from time to time placed Brighton products on sale. On occasion when this would happen, Leegin' s sales representatives would call on her and attempt to secure her agreement not to place Brighton products on sale. When she refused to so agree in February 2002, Leegin stopped shipping to her.

14. Defendant has deliberately set up an unlawful retail pricing policy which it enforces to effect a vertical pricing control to monopolize the market and unfairly penalize the consumers of goods. Defendant reduces competition, which is and can be an effective tool to provide the consumer the maximum benefits of a free market. By enforcing independ-

ent retailers to agree not to discount, Defendant can insulate the retail stores it owns or controls from price competition.

15. As a result of the plaintiffs attempting to exercise their protected rights to compete, and to sell products at prices below those mandated by Leegin, Leegin deliberately sought to punish Plaintiffs, and cut off all future purchases of Leegin-related products. Plaintiff Kay's Kloset had, for many years, a growing business as a result of the sale of Leegin products. Plaintiff Kay's Kloset had an approximate forty-plus percent gross profit margin on the sale of those products, and will lose that base for sales and the anticipated profits of approximately $200,000 per year. Plaintiff Toni's will lose anticipated sales and approximately $50,000 in anticipated profits per year as a result of losing Brighton product sales. Plaintiffs estimate currently that it will take at least seven years for its lost market to be recovered, and that there is no particular line of products that will allow Plaintiffs to quickly find a replacement for the Brighton product line. Leegin-related products occupy such a position in the marketplace that they are not easily replaced, and it will take a long time for customer satisfaction and loyalty to be reestablished to a new product and in turn, Plaintiffs' stores. That is, not only do Plaintiffs lose the benefit of the particular attachment that customers have to Leegin products, it also loses those sales which were from other product lines purchased by Brighton customers. Plaintiffs' estimates of damage are preliminary and continuing.

V.
Causes of Action

16. Anti-Trust Violations: Defendant has committed anti-competitive acts in violations of the federal and state anti-trust laws. Defendant Leegin is a manufacturer and distributor of the Brighton line of clothing accessories. Plaintiffs were a retailers of Brighton products with Defendant. The

Brighton products affect interstate commerce in that the product line is sold and used throughout the country.

17. Defendant has engaged in a price fixing scheme for the Brighton line of products that is illegal per se, and fail as a permissible practice under what is known as the 'Colgate Doctrine'. Defendant has developed and enforced a pricing policy whereby retailers for Brighton products are required to observe "suggested retail prices". Defendant attempted to coerce Plaintiffs to enter into an illegal agreement to follow such suggested retail price. When Plaintiffs failed to do so, Defendant refused to provide any Brighton products for sale by Plaintiff. Defendant's actions in refusing to sell the Brighton line of products to Plaintiff have created an anti-competitive effect in the market for the Brighton line. Specifically, Defendant has violated the Sherman Anti-Trust Act and Clayton Act.

18. Defendant has also violated the anti-trust laws in that it has entered into agreements with retailers to charge only those prices fixed by Leegin. If a retailer refuses to enter into such an agreement, or if after agreeing to such a price fixing scheme, violates the agreement, Leegin deliberately withdraws their products from price competing retailers such as the Plaintiffs, at the request of and/or in combination with each other and competing retailers as part of a conspiracy to protect the other retailers from price competition and protect the suggested retail prices of Defendant.

19. Defendant has also violated Texas Business and Commerce Code § 15.05, et seq., relating to monopolies, trusts, and conspiracies in restraint of trade. Defendant has committed the unlawful practices as described above, including: a) entering into a contract, combination, or conspiracy in restraint of trade or commerce; b) monopolizing, attempting to monopolize, or conspiring to monopolize trade or commerce; and/or c) selling, leasing, or contracting for the sale or lease of goods for use, consumption, or resale, or to

fix a price for such use, consumption, or resale, or to discount from or rebate upon such price, on the condition, agreement, or understanding that the Plaintiff would not be permitted to sell Brighton products without conforming to a price fixing scheme, where the effect of the condition, agreement, or understanding may be to lessen competition substantially in trade or commerce.

20. As a consequence of Defendant's actions, Plaintiffs have suffered injury in the form of prospective lost profits, and are entitled to actual and treble damages. Defendant has taken actions to hurt the value and market share of Plaintiffs' retail business to the benefit of Defendant. As a result of Defendant's actions, Plaintiffs have suffered injury and are entitled to actual and treble damages in accordance with the federal and state anti-trust statutes.

21. Breach of Contract: Defendant sold goods to the Plaintiffs on the basis of FOB Defendant's factory in Industry City, California. Pursuant to the UCC, Plaintiffs were obligated to pay for actual shipping costs for the goods to be delivered to its store. Without informing the Plaintiffs, the defendant charged an amount well in excess of the actual charges for shipping, reimbursement for which costs it was entitled, breaching its obligation to the Plaintiffs. As a result the Plaintiffs were injured and now are entitled to recover the amount improperly charged.

22. Fraud: The Defendant billed the Plaintiffs for "shipping" charges. The bills took the form of Invoices generated by the Defendant and sent to the Plaintiffs. An example of such an invoice is attached hereto as Exhibit "B". Kay's Kloset received those invoices identified by invoice number in Exhibit "C" on or about the dates stated in that exhibit. Toni's received those invoices identified in Exhibit "D" on or about the dates stated in that exhibit. Each such invoice falsely stated that shipping charges were due in the amounts shown in Exhibits "C" and "D". The Plaintiffs relied upon

the representation of the Defendant that the shipping charges were proper charges, and the Defendant's implicit representation that the shipping charges represented the amount of the actual costs charged by the common carrier to deliver the goods. In reliance upon the shipping charge bills, the Plaintiffs paid those charges. The charges were false and inflated, and that the inflation of the charge was intentional by the Defendant. As a result of this false and fraudulent practice, the Plaintiffs are entitled to recover the difference between the actual freight costs, and the shipping charges made by the Defendant, as well as punitive damages.

23. Deceptive Trade Practices Act: The Plaintiffs were consumers of goods they purchased from the Defendant; the Defendant engaged in false, misleading and deceptive acts in charging more for shipping than the actual cost of shipping; and as a result of those charges, the Plaintiffs have been injured. Pursuant to the Texas Deceptive Trade Practices Act, the Plaintiffs are entitled to recover those damages suffered as well as attorney fees.

WHEREFORE, ON THE ABOVE PREMISES, Plaintiffs respectfully requests, after trial of this cause, that Plaintiff be awarded; a) actual damages; b) treble and/or punitive damages; c) attorney's fees and costs; and d) all other relief to which Plaintiffs may be justly entitled, including equitable relief necessary to protect Plaintiffs' interest and/or to reinforce the applicable protection of federal and state law.

Respectfully submitted,

/s/

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